Filed 11/28/16 P. v. Redd CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. BRANDON AARON REDD, Defendant and Appellant.	E064821 (Super.Ct.No. FVI09129) OPINION

APPEAL from the Superior Court of San Bernardino County. Raymond L. Haight III, Judge. Affirmed.

James R. Bostwick, Jr., under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Andrew S. Mestman and Arlene A. Sevidal, Deputy Attorneys General, for Plaintiff and Respondent.

The trial court denied the Proposition 47 petition for defendant and appellant Brandon Aaron Redd. (Pen. Code, § 1170.18.) Defendant raises three issues on appeal. First, defendant contends the trial court erred by concluding the offense of driving or taking another person's vehicle (Veh. Code, § 10851) is not a misdemeanor pursuant to Proposition 47. Second, defendant asserts the trial court erred by conducting the Proposition 47 hearing ex parte. Third, defendant contends his right of equal protection has been violated to the extent Vehicle Code section 10851 remains a felony in all circumstances while grand theft of a vehicle valued at $950 or less (Pen. Code, § 487, subd. (d)(1)) has been transmuted into a misdemeanor. We affirm the judgment.

FACTUAL AND PROCEDURAL HISTORY

Defendant was charged with three counts: (1) unlawfully driving or taking another person's vehicle (Veh. Code, § 10851, subd. (a)); (2) first degree residential burglary (Pen. Code, § 459); and (3) evading a peace officer (Veh. Code, § 2800.2, subd. (a)). The crimes were alleged to have occurred on or about December 8, 1998. It was also alleged defendant suffered a prior conviction for which he served a prison term. (Pen. Code, § 667.5, subd. (b).)

On July 9, 1999, defendant pled guilty to unlawfully driving or taking the victim's vehicle—a 1994 Geo Metro. The court sentenced defendant to prison for a term of three years. The trial court imposed a restitution fine of $600. (Pen. Code, § 1202.4, subd. (b).) On September 29, 1999, the trial court ordered direct victim restitution in the amount of $169.20. (Pen. Code, § 1202.4, subd. (a)(1).) A report from the San Bernardino County Probation Department reflected the victim's car suffered "a

bent rim and a damaged tire" as a result of defendant's crime. The victim replaced the damaged parts, but only sought restitution for the day of work he missed. One day of wages for the victim was $169.20.[1]

On October 7, 2015, defendant filed a petition for resentencing. (Pen. Code, § 1170.18.) In the petition, defendant requested his conviction for violating Vehicle Code section 10851, subdivision (a), be reduced to a misdemeanor. The petition reflected defendant had completed serving his prison sentence for the crime. There were no documents attached to the petition. That same day, October 7, the prosecutor filed a response. The prosecutor asserted defendant was not entitled to resentencing because Vehicle Code section "10851 is not covered by Prop. 47."

On a local form entitled "Order for Resentencing," submitted by defendant's trial counsel, the trial court marked the box indicating the matter was set for a hearing and wrote the hearing would be October 30, 2015, at 8:30 a.m. The "Order for Resentencing" was filed by the court on October 9. There is nothing indicating on whom the order may have been served, i.e., if it was mailed to the prosecutor and defense counsel.

On October 30, the trial court held the scheduled hearing. The minute order reflects the prosecutor was present and defendant was not present. There is no mention of defendant's trial counsel. At the hearing only two people spoke, the trial judge and the prosecutor. The court asked, "What's the district attorney's position?" The

[1] The record on appeal was augmented with the Probation Report. There is nothing indicating the Probation Report was presented to the trial court.

prosecutor responded, "The charge is not covered by Prop 47." The court said, "That's correct. Vehicle Code Section 10851 isn't an eligible crime. The petition will be denied. It's not an eligible crime."

DISCUSSION

A. MISDEMEANOR

Defendant contends the trial court erred by concluding Vehicle Code section 10851 is not a misdemeanor under Proposition 47.

Proposition 47 reduced some felony theft offenses to misdemeanors. (*People v. Johnston* (2016) 247 Cal.App.4th 252, 255-256.) Vehicle Code section 10851 is not explicitly listed in Proposition 47 as a crime that has been transmuted from a felony to a misdemeanor. (*Johnston*, at p. 256.) A Vehicle Code section 10851 offense can be committed in different ways. "It prohibits taking or driving a vehicle with intent to either permanently or temporarily deprive the owner of title or possession of, and with or without intent to steal the vehicle." (*People v. Jaramillo* (1976) 16 Cal.3d 752, 757.) Section 490.2, which was added to the Penal Code by Proposition 47, provides "obtaining any property by theft where the value of the . . . property taken does not exceed nine hundred fifty dollars ($950) shall be considered petty theft and shall be punished as a misdemeanor."

There is a split of authority in the intermediate courts of appeal as to whether Proposition 47 caused some Vehicle Code section 10851 offenses to be misdemeanors. Where a defendant violates Vehicle Code section 10851 by taking a car worth $950 or less, one appellate court concluded such an offense is now misdemeanor petty theft.

(*People v. Ortiz* (2016) 243 Cal.App.4th 854, 860 [Sixth District], review granted March 16, 2016, S232344.) A differing conclusion is that Vehicle Code section 10851 is not listed in Proposition 47 and therefore remains a felony in all circumstances. (*People v. Page* (2015) 241 Cal.App.4th 714 [Fourth Dist., Div. Two], review granted January 27, 2016, S230793.) The issue is currently pending before our Supreme Court.

In the instant case, even if defendant is correct that Vehicle Code section 10851 is a misdemeanor when the offense involves the taking of a car worth $950 or less, we could not reverse the judgment. Defendant has not shown that he took the car or that the car was worth $950 or less. (*People v. Sherow* (2015) 239 Cal.App.4th 875, 880 (*Sherow*) [defense bears the burden of proof].) The record reflects defendant damaged the car's tire and rim, which indicates defendant drove the car. As a result, defendant's violation of Vehicle Code section 10851 could be due to driving the vehicle, rather than taking the vehicle. (See *People v. Jaramillo*, *supra*, 16 Cal.3d at p. 757 ["Vehicle Code section 10851 proscribes a wide range of conduct"].) Further, the record reflects the victim spent approximately $25 at a junkyard to repair the damage defendant inflicted on the car, but there is no indication as to the car's overall value. (See Pen. Code, § 490.2, subd. (a) [value of the property is $950 or less].)

Due to the lack of information in the record as to whether defendant took a car worth $950 or less, the trial court properly denied defendant's petition—defendant failed to meet his burden of establishing that he qualified for resentencing. (*Sherow*, *supra*, 239 Cal.App.4th at p. 880 [a proper petition should contain evidence]; *In re Lucero L.* (2000) 22 Cal.4th 1227, 1249-1250 [a correct ruling will be upheld even if the

reasons for the ruling were incorrect].) Because it is possible (1) defendant is guilty of violating Vehicle Code section 10851 due to driving the car, rather than taking the car; and (2) the car could be worth more than $950, there is little point to us delving into a discussion of whether Vehicle Code section 10851 would be a misdemeanor when the crime is committed by taking a vehicle worth $950 or less. It is not clear that such a discussion is relevant to this case, given the lack of information in the record about defendant's offense. At this point, without more information about defendant's offense, it is an academic/abstract question as to whether Vehicle Code section 10851 would be a misdemeanor in certain circumstances. We do not address purely academic questions. (*In re Marquis H.* (2013) 212 Cal.App.4th 718, 724 [purely academic questions are dismissed as moot].)

Defendant filed his petition for resentencing on October 7, 2015, shortly after the filing of cases such as *Sherow* (filed August 11, 2015), which explained evidence should be attached to the petition. (*Sherow*, *supra*, 239 Cal.App.4th at p. 880.) Due to defendant's petition being filed close in time to the filing of the *Sherow* opinion, we will affirm the judgment without prejudice to defendant filing another petition in which he provides evidence indicating he qualifies for relief.

B. DUE PROCESS

Defendant contends the trial court violated his right of due process by not providing defendant and his counsel notice of the Proposition 47 hearing and by conducting the hearing without defendant and his counsel being present.

A trial court can deny a facially deficient petition without a hearing. *People v. Perkins* (2016) 244 Cal.App.4th 129, 138.) Defendant does not indicate what evidence he would have offered at the hearing if he or his trial counsel had been present. Thus, our analysis *ante*, that the judgment must be affirmed due to defendant's failure to meet his burden, is unchanged. There is nothing indicating that if defendant or his counsel had been present at the hearing evidence would have been offered reflecting defendant was eligible for relief, i.e., that defendant violated Vehicle Code section 10851 by taking a car valued at $950 or less, as opposed to driving a car valued at $951 or more. (See *In re Rebecca R.* (2006) 143 Cal.App.4th 1426, 1431 [offer of proof on appeal].)

We note defendant's motion to augment the record on appeal was granted by this court. The augment includes a probation report reflecting defendant damaged the victim's car's tire and rim, which indicates defendant drove the victim's vehicle. The report also reflects the victim spent approximately $25 at a junkyard repairing the damage. There is nothing indicating how defendant acquired the victim's car or the overall value of the car. Thus, the judgment must be affirmed because defendant has not established that he is eligible for relief under Proposition 47 by taking a car valued at $950 or less. In sum, defendant's petition was facially deficient, and a hearing was not required in order to summarily deny the petition. (*People v. Perkins, supra,* 244

Cal.App.4th at p. 138 [a facially deficient petition can be denied without a hearing]; see also *People v. Sherow*, *supra*, 239 Cal.App.4th at p. 880 [defendant bears the burden of establishing eligibility for Proposition 47 relief].)

C. EQUAL PROTECTION

Defendant contends his right of equal protection has been violated to the extent Vehicle Code section 10851 remains a felony in all circumstances while grand theft of a vehicle valued at $950 or less (§ 487, subd. (d)(1)) has been transmuted into a misdemeanor. As explained *ante*, defendant has not shown that he committed his crime by taking a vehicle valued at $950 or less. It is possible defendant violated Vehicle Code section 10851 by driving a vehicle valued at $951 or more.

Therefore, given the record, we cannot determine if defendant is similarly situated to a person convicted of grand theft of a vehicle valued at $950 or less. (See *People v. Brown* (2012) 54 Cal.4th 314, 328 [first step of an equal protection analysis is showing two groups are similarly situated].) As a result, any discussion about the two crimes would be purely academic because we cannot determine if a discussion about taking a car valued at $950 or less is applicable to defendant. We do not engage in purely academic discussions, and therefore do not discuss the issue further. (*In re Marquis H.*, *supra*, 212 Cal.App.4th at p. 724 [purely academic questions are dismissed as moot].)

DISPOSITION

We affirm the denial of defendant's petition without prejudice to defendant filing a subsequent petition.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

MILLER
J.

We concur:

RAMIREZ
P. J.

CODRINGTON
J.